Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

REPLY COMMENTS OF GENERAL COMMUNICATION, INC.

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October 19, 2004

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General Communication, Inc. ("GCI"), by its undersigned counsel, hereby submits this reply to comments filed in response to the Notice of Proposed Rulemaking in the above captioned-proceeding ("NPRM" or "Notice").

I. INTRODUCTION AND SUMMARY

Pursuant to the Notice of the Federal Communications Commission ("Commission" or "FCC") in the above-captioned dockets, numerous parties filed comments advocating how the FCC should respond to the mandate of the DC Circuit in *USTA II*,[1] consistent with the statutory objectives for the "promotion of competition and the protection of consumers".[2] GCI again urges this Commission to take the necessary steps to ensure that the consumer benefits delivered by competitive choice and the availability of innovative products and services continue to be realized. As described below, GCI concurs with the comments of several parties that the FCC should not reflexively abandon the impairment standard it adopted in the *Triennial Review*

[1] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, (Oct. 12, 2004).
[2] NPRM at ¶ 1.

Order.[3] While the FCC can respond to the *USTA II* court's "general observations" regarding the standard through refinements to the application of that standard, the record established in the proceeding further substantiates the efficacy of the impairment standard developed in the *Triennial Review Order*.

GCI also replies specifically herein to the comments of ACS of Anchorage, Inc. ("ACS") filed in this docket.[4] ACS repeats its earlier demands that it should be relieved of all unbundling obligations—including all loop unbundling, a request the Commission resoundingly rejected in the *Triennial Review Order* and which is not part of the issues on remand from the Court. This is just ACS' attempt at another bite from a bad apple. ACS is not advocating for a sustainable impairment standard. Instead, it has demonstrated (again) that it will make any argument, no matter how unreasonable, to eliminate competition in Anchorage, and to eliminate GCI as a competitor, as quickly as it can without any regard for the public interest.

To ACS, GCI's retail market share and its real commitment to offering service over upgraded cable plant mean that its time to shut down competition altogether by eliminating GCI's access to unbundled loops, which GCI currently relies on to serve over two-thirds of its customers in Anchorage. If adopted, ACS' plan would, immediately render over two-thirds of GCI's customers inaccessible to GCI. Quite plainly, this is nothing less than ACS' effort to end competition in Anchorage, where local competition has a success—delivering cost savings, better services, and investment,

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[3] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order, Order on Remand, and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (rel. Aug. 21, 2003) ("*Triennial Review Order*" or "TRO").

[4] Comments of Alaska Communications Systems Group, Inc., WC Docket No. 04-313, CC Docket 01-338 (filed Oct. 4, 2004) ("ACS Comments").

For this success to continue, GCI needs access to UNEs. And ACS' inability to keep its story straight about why unbundling is no longer necessary only highlights the patent deficiency of ACS' proposed "standard" required to yield ACS' desired result. On the one hand, ACS argues that the FCC should eliminate any unbundling requirements for ACS in Anchorage, arguing that GCI no longer needs UNEs because it has deployed its own facilities. [5] Only pages later, however, ACS contradicts itself, arguing that the FCC should eliminate the availability of UNEs to provide the incentive for GCI to invest in its own facilities.[6] ACS' intent is clear: to advocate any argument to eliminate UNEs, no matter how implausible, in an effort to have the Commission do through regulation what ACS has been unable to do in the market—eliminate competition in Anchorage, thereby, permitting ACS to recoup the monopoly profits it has lost as GCI has built a customer base primarily through UNE-loop competition. Not only is ACS' empty rhetoric against *any* unbundling at odds with the statute, unchallenged portions of the *Triennial Review Order*, and the public interest, but it also fails to provide to the FCC with a useable and sustainable impairment standard.

ACS also attempts to reinvent the history of the *USTA II* decision and the state Triennial Review case in Alaska, raising objections for the first time to the unbundling of UNEs not remanded by *USTA II*, not previously challenged by ACS or, in some cases, not challenged by any ILEC anywhere in the country. As GCI demonstrated in comments summarizing Alaska-specific data gathered in the state *TRO* proceeding and the weight of the comments filed in this proceeding, there is support for the continued finding of impairment as to high capacity loops (particularly DS1 loops) and dedicated transport on a route-specific basis. It defies reason,

[5] ACS Comments at 1-2.
[6] *Id.* at 7.

moreover, that the Commission would begin to consider eliminating DS-0 loops—as ACS alone proposes—where the immediate result would be to eliminate facilities-based competition to the overwhelming majority of the customer loops, thereby threatening local competition as a whole in Anchorage.

As to the "substance" of the matter, ACS' assertions throughout its comments with respect to GCI's operations in Anchorage are either exaggerated, incorrect or lack evidentiary support. Often, the only evidence ACS offers to support its misstatements are references to ACS' own comments or witness testimony in the state *TRO* proceeding. Such exaggerated, unsupported facts cannot reasonably support blanket findings of non-impairment *for all UNEs* in Anchorage. In response, GCI corrects the record accordingly herein.

At bottom, Anchorage is one of the most competitive markets in the country, with consumers benefiting from head-to-head competition. As GCI has been able to build a customer base with access to UNE-loops, the promise of full facilities-based competition will be realized over time. For ACS, elimination of UNEs now is critical to stopping competition in the hopes of also stopping continued deployment of competitive facilities. ACS' self-interest in restoring monopoly, however, is no basis for blanket elimination of all UNEs.

II. NO LEGAL GROUND EXISTS TO ADOPT A UNIQUE IMPAIRMENT TEST FOR ANCHORAGE AND FOR GCI

ACS proposes a brand new impairment standard that "is specific to the CLEC requesting unbundled access"[7] to UNEs and that is tailored to the "conditions experienced by the regulated carrier."[8] Such a test is clearly designed specifically to eliminate competition in Anchorage and eliminate GCI as a competitor. But the FCC has already rejected the concept of a CLEC-specific

[7] ACS Comments at 14.
[8] *Id.*

test, stating that such an approach would be "administratively unworkable for regulators, incumbent LECs and new entrants alike because it would require case-by-case determinations of impairment and continuous monitoring of the competitive situation."[9] Similarly, the FCC declined to make impairment determinations on an ILEC-by-ILEC basis stating that the impairment inquiry focuses on requesting carriers not incumbent LECs".[10]

Under the ACS test, no national impairment finding can be made, a CLEC has the burden of continual proof of impairment, and that burden cannot be met if the CLEC serves customers and there is cable plant in the market. Not only is the FCC's current impairment standard sound, but the one proposed by ACS—to eliminate the potential for any unbundling practically anywhere—is to pretend as if the statute does not exist at all.

As an initial matter, GCI concurs with the comments of several parties that the core definition of the impairment standard articulated by the FCC in the *Triennial Review Order* is sound,[11] and ACS offers no new legal argument to the contrary. The court in *USTA II* found no "statutory offense" in the FCC's standard and thus, "in the context of the current rulemaking, there is no reason to reformulate the general impairment standard adopted in the *Triennial Review Order"*.[12] Hence, GCI supports the comments of several parties that the standard applied in this proceeding should continue to be "[a] lack of access to an incumbent LEC network element [which] poses a barrier to entry, including operational or economic barriers, that are likely to make entry into a market uneconomic".[13] GCI concurs with the view that the

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[9] *Triennial Review Order* at ¶ 115.

[10] *Id.* at ¶ 116.

[11] Comments of the Pace Coalition, Broadview Networks, Grande Communications, and Talk America, Inc. ("Joint Commenters") at 29-31; see also Loop and Transport Coalition Comments at 22.

[12] Comments of Joint Commenters at 29, 30 (citing *USTA II*, 359 F.3d at 571-72).

[13] Loop and Transport Coalition Comments at 24 (citing *Triennial Review Order* at ¶ 84).

"competitive industry can ill afford to have the agency tinker with that which the court has looked on favorably…."[14] What the telecommunications industry needs now is certainty and not a re-examination of issues that are not even in dispute.

Additionally, GCI agrees that *USTA II* did not call into question the analysis adopted by the FCC including the granular, market-by-market approach in which to examine whether entry is uneconomic, and whether entry into that market has already occurred without reliance on the ILEC network through the self-provisioning or third-party provisioning (the triggers).[15] Accordingly, the FCC should retain this framework, which was specifically designed to address the Court's articulated concerns in *USTA I*.[16] Though the *USTA II* Court determined that state commissions were not to apply these standards to determine impairment, the determination can and should still be made under the established criteria. And sufficient progress has been made so the Commission can now make those determinations. As the Joint Commenters correctly point out, much of the data and analyses prepared for the state cases are pertinent to the investigations that the Commission must now undertake.[17] For its part, GCI presented in its initial comments the relevant data developed that demonstrates the need for continued availability of specific UNEs for the Anchorage market.[18]

In its comments, however, ACS raises issues that are not even in dispute and which the *USTA II* Court did not even remand for Commission review. For example, ACS argues that the Act requires that a CLEC have the burden of proof on a case-by-case basis to demonstrate

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[14] Comments of Joint Commenters at 33.

[15] Loop and Transport Coalition Comments at 24 (citing *Triennial Review Order* at ¶ 84).

[16] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

[17] Comments of Joint Commenters at 31-32.

[18] *See generally* GCI Comments at 29-31 . ACS and GCI have reached a voluntary agreement regarding the availability of UNEs in Fairbanks and Juneau through January 1, 2008.

impairment when it seeks access to UNEs.[19] ACS provides no support for this novel legal argument whereby CLECs are tasked again and again to demonstrate impairment (presumably to the FCC, but ACS does not say), based largely on information and data held by the incumbents. ACS is asking this Commission to have an individual proceeding for every CLEC in every market. To arrive at this argument, ACS has to read into the statutory language of the Act an obligation on the CLECs that is simply not there, implausibly stretching the *USTA I* Court's caution against a belief that "more unbundling is better" to a mean that individual CLECs must continually justify access to each UNE in each market—including DS-0 loops.

In its zeal, ACS seems to have forgotten that this is a rulemaking proceeding, where the record has already been built to support the establishment of rules implementing the statutory unbundling requirements. This new take on the unbundling regime finds no support in the statute. ACS' attempt to shift the burden onto the CLEC for every UNE is a rewrite of the Act itself and represents nothing more than an attempt, in the wake of *USTA II,* to get the FCC to start over from square one, with the pleasant result (for ACS and all ILECs) of sending competition packing. ACS' burden argument is more than is required by the remand before the FCC, is meant to fundamentally undermine the unbundling rulemaking regime, and should be rejected accordingly.

In this regard, ACS' claim that any national unbundling requirement would be unlawful[20] is simply unsustainable. *There is no standing challenge to the national impairment finding for mass market loops*. Indeed, this is the single element for which there is no dispute, including the Supreme Court, which acknowledged that "entrants may need to share some facilities that are

[19] ACS Comments at 4 - 5.
[20] *Id.* at 4.

very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology)."[21]

ACS is alone among ILECs in its strategy to eliminate all UNEs—including mass market loops—for an individual CLEC. For example, SBC recognizes that access to a particular UNE could not occur in the absence of a finding that "alternative providers are already competing successfully without [UNE access]."[22] ACS can make no showing of alternative providers in Anchorage "already competing successfully without [UNE access]." In its comments, USTA states that prior court decisions "require the FCC to take into account real competition in various markets and to compel unbundling only where competitors cannot compete without access to certain [ILEC] facilities."[23] GCI still requires UNE access to reach the vast majority of the Anchorage market. BellSouth urged the Commission to limit its review "to those issues that were remanded by the D.C. Circuit."[24] Certainly no party has argued that the Commission's mass market loop determination was even before the Court, let alone remanded for further consideration.

While GCI does not endorse these ILEC comments, it is noteworthy that ACS stands alone in advocating an impairment analysis that would eliminate UNEs simply due to a CLEC's building a retail customer base and some future prospect of serving those customers via alternative facilities. ACS-AN grasps to stop the advance of full facilities-based competition by cutting off UNEs even before "intramodal and intermodal competitors are providing service

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[21] *Verizon Communications v. FCC*, 535 U.S. 467, 510 n.27 (2002).
[22] SBC Comments at 11.
[23] USTA Comments at 2.
[24] BellSouth Comments at 3.

without UNE access."[25] ACS tries to avoid scrutiny of its bankrupt proposal by proposing to limit its self-serving approach to a test aimed at eliminating competition in Anchorage, but there is no basis for any test designed, as this one is, to protect a single incumbent for its own failings in the competitive market. Plainly, the ACS approach would render the unbundling regime a null set as a practical matter, and for Anchorage specifically, the result would be the denial of carrier choice to over 97% of the Anchorage customer loops. This approach would render the statute meaningless and is undeserving of any consideration.

III. ACS' PROPOSAL TO ELIMINATE FACILITIES-BASED COMPETITION MUST BE REJECTED AGAIN

ACS argues that "in light of GCI's substantial market share and extensive facilities deployment" ACS should no longer be required to unbundle any elements.[26] Hence, the basic tenets of ACS' proposed criteria for ending its statutorily mandated unbundling obligations all come down to ACS' bid for the Commission to protect ACS from GCI's competitive gains. Market share and overblown assessments of alternative facilities deployment are not sound rationale upon which ACS should be excused from its obligations under the Act. The FCC should reject ACS' latest attempt to end competition and return to its incumbent monopoly.

A. The Commission Rightly Rejected ACS' Retail Market Share Standard

ACS recycles here its earlier claims that a "market-share" test should be used to deny CLEC access to all UNEs, including mass market loops.[27] According to ACS, GCI's retail

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[25] SBC Comments at 12.

[26] ACS Comments at 2.

[27] In the earlier *Triennial Review* proceeding, ACS claimed that continued access to UNEs would drive ACS out of business. Letter from Karen Brinkman, Latham & Watkins, LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, and 98-147 at 2 (filed January 6, 2003) ("January 6, 2003 ACS Ex Parte Letter") at 2 and 9. As GCI demonstrated then, ACS' claims clearly were not true, as both its continued success and total abandonment of that approach prove. The end-game for ACS then was as it is today—to eliminate competition and return to captive customers and monopoly profits.

market share is dispositive of the impairment issue in Anchorage.[28] As it did in the *Triennial Review* proceeding, ACS continues to claim that certain levels of retail market share support a finding of non-impairment,[29] once again citing the success of the 1996 Act unbundling regime in Alaska as the reason for shutting it down. The FCC squarely rejected ACS' proffered correlation between retail market share and access to UNEs before, ACS has done nothing to cure the deficiencies in this approach, and the analysis is no different today.

In the *Triennial Review* proceeding, ACS asked that the FCC eliminate unbundling requirements in "markets where there are high levels of retail competition, such as Alaska."[30] The FCC's response was an unequivocal no.[31] The FCC expressly rejected the ACS request that the FCC "not require unbundling in markets where competitors have achieved a particular market share, where competitors have a certain number of collocations, or where consumers have a choice of facilities-based providers."[32] Thus, the ACS arguments here run directly counter to the FCC's unassailable conclusion that it "not . . . base [its] impairment determination on whether the level of retail competition is sufficient such that unbundling is no longer required to enable further entry."[33]

Central to the FCC's analysis is the fundamental distinction between retail and wholesale

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[28] Though ACS generally cites market share as the basis for its own special impairment standard (ACS Comments at 5), it specifically incorporates a retail market share cap to cut off access to mass market loops. ACS Comments at 14. ACS LECs' Request for the RCA to Order the Production of Supplemental Information in Order to Make the Necessary Factual Findings Required in Order No. 1, R-03-7 (filed Jan. 27, 2004) ("ACS Request for Data") (attached hereto as Exhibit 4) at 4.

[29] *See* ACS Comments at 13-16; Shelanski Affidavit at 8-10.

[30] *See* January 6, 2003 ACS Ex Parte Letter; *See also* Letter from Karen Brinkmann, Latham & Watkins, LLP, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Jan. 7, 2003) ("January 7, 2003 ACS Ex Parte Letter"); Ex Parte Notice, Karen Brinkmann, Latham & Watkins, LLP, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed Jan. 16, 2003) ("January 16, 2003 ACS Ex Parte Letter").

[31] *Triennial Review Order* at ¶ 114.

[32] *Id.* at ¶ 115 (citing ACS *Ex Parte* Letters, dated Jan. 6, 2003 and Jan. 16, 2003).

[33] *Id.*

markets. Recognizing that "the relationship between retail competition and unbundling is complex," the FCC found that "[i]n many instances, retail competition depends on the use of UNEs and would decrease or disappear without those UNEs; thus, a standard that takes away UNEs when a retail competition threshold has been met could be circular."[34] The FCC was right.

GCI previously demonstrated that it is impaired without access to UNEs at TELRIC-based rates, particularly loops, transport and switching.[35] ACS provides no evidence to refute the fundamental fact with respect to the UNE inputs it supplies to other carriers. Instead, ACS simply asserts that it should no longer be required to provide CLECs having any measurable retail market share with access to UNEs, and for mass market loops proposes criteria primarily based on a competitor's share of the *retail* market to determine when its unbundling obligations should sunset. ACS' proposals are shams, and lack any economic basis. A CLEC's ability to obtain *retail* customers, even in significant numbers, does not mean that the CLEC has a choice in its supplier of inputs, including self-supply. GCI has gained a large share of the Anchorage retail local telephone market, but it remains almost wholly dependent on ACS to provide unbundled loops. ACS' market power in the market for loops is virtually undiminished from the days before competition.

Congress expressly recognized that retail market competition is not the standard by which the Commission determines whether an ILEC must comply with the unbundling obligations in the Act. Section 251(d)(2)(B) requires the Commission to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications

[34] *Id.*; GCI RCA Reply Comments - Kelley Reply Testimony at ¶¶ 37-38.
[35] *See generally* GCI Comments at 27-31.

carrier seeking access to provide the services it seeks to offer."[36] Congress expressly recognized that UNEs are inputs into a CLEC's provision of retail telecommunications services. What must be impaired is the CLEC's ability to provide its retail service in the absence of the ILEC-provided UNEs. As the Commission has rightly determined, the statutory impairment test therefore requires evaluation of the CLEC's alternative sources of the *input,* not the consumer's alternative sources of the *output*. ACS' proposal to sunset UNEs based on the consumer's alternatives in the output market, rather than the CLEC's alternatives in the input market therefore violates the plain language of Section 251(d)(2)(B).

Thus, when ACS witness Shelanski cites GCI market share data as "[t]he most basic proof of GCI's lack of impairment,"[37] he is conceding that the central proof upon which ACS relies for its claim of "no impairment" is that which has already been rejected by the FCC. This discredited ACS theory can hardly be cited as persuasive evidence of non-impairment for any UNE.

ACS has provided no evidence to demonstrate that there is an existing alternative source of supply from which GCI can obtain UNEs. The simple facts demonstrate otherwise. Today in Anchorage, Alaska, even though GCI has a substantial share of the retail market, *GCI still serves a very small percentage of its Anchorage lines entirely over its own facilities*. ACS was incorrect last year when it stated before that "the bargaining power between GCI and ACS has shifted in GCI's favor" based on GCI's growth in the retail market. ACS' latest take on the issue—that "the bargaining power . . . would be equalized in the Anchorage market" in the absence of unbundling because GCI has built new construction to two subdivision of *470 of the*

[36] 47 U.S.C. § 251(d)(2)(B).
[37] ACS Comments - Shelanski Affidavit at ¶ 24.

over 170,000 lines in Anchorage[38]—is still incorrect. GCI has no power in the wholesale market for UNEs, which is the relevant market to examine under Section 251(d)(2)(B).

ACS' "market-based" approach is just another way of asking the Commission to protect ACS from its own failings in the marketplace. Without unbundling, consumer choice in Anchorage would be virtually non-existent. ACS does not provide any evidence to demonstrate that its bottleneck over ubiquitous loops—the most fundamental barrier that forces CLECs to rely on UNEs in the first place—has been eliminated in Anchorage. Indeed, while GCI is investing in cable telephony, which is intended to provide a facilities-based competitive alternative for those customers passed by cable plant (and which notably does not extend to many business customers), that alternative is not a replacement today in Anchorage or any other market.[39] Thus, ACS' reliance on retail market-share as a trigger for eliminating UNE access once again fails to consider the sources of CLEC impairment, is intended solely to eliminate competitive entry in the first place, and should once again be dismissed.

B. ACS Proposes to Eliminate All UNEs—Including DS-0 Loops— Before Impairment is Addressed by Facilities Deployments

ACS claims throughout its comments because of GCI's "extensive" facilities deployment[40] and the "increasing" ability to reach the "entirety" of the Anchorage market,[41] ACS should no longer be required to provide access to *any* UNEs in the Anchorage market,

[38] ACS Comments at 2-3 & 18. Even ACS' claim of lack of access to these 470 lines is wrong. GCI has offered unbundled loops at ACS' TELRIC rates and resale at wholesale rates; ACS has opted to serve a few customers via resale.

[39] The fact that GCI—a competitor that has been at the forefront of facilities investment in urban and rural markets—still remains captive to ILEC bottleneck facilities is itself probative of the continued need for unbundling.

[40] ACS Comments at 2.

[41] *Id.* at 16.

including DS-0 loops.[42] From ACS' perspective, it is precisely because the Anchorage market is developing the type of facilities-based competition under current rules that Congress and the FCC contemplated that ACS would have the FCC deny access to the facilities that are necessary for current service and that make future facilities deployment possible.[43] Ironically, ACS then goes on to argue that the reason it should no longer be required to provide access to UNEs is to provide the right incentives to GCI to deploy its own facilities,[44] conceding that denial of access to these facilities will leave GCI no alternative for serving its customers. ACS is playing a game of regulatory chicken. Rather than compete head-to-head for customers, and rather than seeking a real market-based approach to GCI's use of ACS facilities, ACS would like to eliminate GCI from the market by manipulating the regulatory policy before full facilities-based competition can be implemented.[45] Such game playing should not be used to end the availability of critical UNEs and competition in the Anchorage market.

To support its position that ACS should no longer be obligated to provide UNEs, ACS grossly overstates the deployment of GCI's cable telephony service. For example, ACS

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[42] *Id.* at 21.

[43] *See In the Matter of the New Requirements of 47 CFR § 251 Related to FCC Triennial Review Order on Interconnection Provisions and Policies,* R-03-7, (hereinafter referred to as Alaska Triennial Review case or state case) GCI Reply Comments, at 3 (attached hereto as Exhibit 1) (hereinafter referred to as "GCI RCA Reply Comments") (this exhibit includes all GCI Reply Testimony from the state case including Testimony of Thatcher, Kelley, Borland, Keeling, Brown).

[44] *See* ACS Comments at 7, 14, and 18.

[45] Indeed, the evidence shows that competition is working in Alaska with respect to products and services. In GCI's experience, in markets where ACS has to compete with GCI, ACS has introduced new products and bundled service offerings in an attempt to mirror and compete with what GCI has brought to the market. Not surprisingly, however, in areas where it faces no competition, ACS simply does not offer to its customers those very same products or bundled packages that it makes available to its consumers in competitive areas. A visit to the ACS website reveals that such products or bundled services are simply "unavailable" in the monopoly areas. (See attached example from website http://www.acsalaska.com/consumer/c-local/c-bundles/area5.stm attached hereto as Exhibit 2 using "Akutan" as the search location). Apparently, without competition, there is no reason for the incumbent to bring new offerings to consumers to meet competitive choices. There is no incentive for the ILEC to innovate or provide improved offerings or services when that consumer has no where else to go for telecommunications service.

claims that "GCI provides [local exchange] services substantially over its own facilities and is transitioning the entirety of its local exchange service customer base to GCI's cable plant, which passes nearly every residence and business in Anchorage."[46] Further stretching to make its case, ACS states that "[t]he record overwhelmingly demonstrates GCI's current and increasing ability to serve the entirety of the Anchorage market over its own facilities."[47] In addition to being overstated and misleading, at the core of all of ACS' statements is the (wrong) assumption that GCI's cable facilities are immediately and instantaneously available for the provision of telephony and that such facilities offer the prospect of a ubiquitous alternative throughout the Anchorage service area.[48] Neither assertion—which ACS supports only with reference to itself[49] or not at all[50]—is correct.

As GCI explained in its initial comments in the instant case, GCI cable plant requires certain upgrades before it is hospitable to voice communications.[51] GCI is in the process of undergoing significant investments on a neighborhood-by-neighborhood basis to make its cable plant hospitable to quality voice transmissions, such as the addition of new equipment that creates the backbone for service delivery of GCI's cable telephony – the voice gateway, the cable modem termination system, and the broadband telephone interface.[52]

Cable plant modifications are also required such as installation of a fiber ring to the Optical Transition Nodes ("OTN") which send to large portions of the city certain detailed power requirements to accommodate all aspects of the BTI – the cable version of the Network Interface

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[46] ACS Comments at 1. *See also* ACS Comments at 8, 13.
[47] *Id.* at 16.
[48] GCI RCA Reply Comments - Borland Reply Testimony at 5.
[49] *See e.g*. ACS Comments at 8.
[50] *See e.g. id*. at 16.
[51] GCI Comments at 8.
[52] *Id.*; *see also* GCI RCA Reply Comments - Borland Reply Testimony at 5.

Device or "NID" - and replacement of power supply batteries to extend back-up capacity of the cable telephony service to eight hours.[53] Telephony service cannot be provided to a particular cable-plant-served premise without these modifications to each customer line. Additionally, once such installations and plant modifications are completed, there are separate steps for converting the customer to GCI's cable telephony system which requires a "disconnect".[54]

Although GCI does indeed have a schedule to convert customers to the "greatest extent possible" in Anchorage to its own facilities within the next few years, even that will take years.[55] GCI's current plans include the conversion of 8,000 to 12,000 lines in 2004 in parts of Anchorage with an expansion plan to other parts of Anchorage over subsequent years.[56] There are more than 170,000 lines in Anchorage. From this deployment schedule, and the detailed neighborhood-by-neighborhood, community-by-community installation and modification process described above, it is obvious that GCI will need access to UNEs, and particularly UNE-loops, throughout large portions of Anchorage for quite some time.[57]

In its overbroad assertions, ACS also glosses over the fact that GCI's cable plant does not "pass nearly every residence and business in Anchorage," as claimed.[58] As is the case with most cable footprints, the GCI cable plant reaches almost exclusively residential premises. Not only is cable plant not a provisioning alternative where upgrades have not been completed, but it certainly provides no alternative where there is no cable plant at all.[59]

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[53] *Id.* at 6.
[54] *Id* at 6.
[55] *Id* at 6.
[56] Borland Reply Testimony at 6.
[57] *Id.* at 6.
[58] *Id.* at 6-7.
[59] *Id.*

ACS also claims throughout its comments that GCI's "extensive cable telephony platform" demonstrates that GCI is not impaired without access to UNEs, such as local switching, and therefore, ACS should not be required to provide access to any UNEs.[60] Such reliance on the GCI cable network as the basis for "no impairment", however, is misplaced. The FCC found that the technology does not provide any "probative evidence of an entrant's ability to access the ILEC's wireline voice-grade local loop" and rejected the notion that cable telephony provides an acceptable substitute for elements, such as local switching.[61] Even if these findings were ripe for review on remand—which they are not—ACS has provided no evidence to the contrary.

ACS' attempt to deny consumers access to facilities-based competitive alternatives based on speculation about new cable telephony deployments over the next months or even years simply holds no water. The Regulatory Commission of Alaska ("RCA") concluded as such, holding that "[i]t would be speculative to conclude that no impairment exists today based on an expectation of what a carrier might deploy two years in the future."[62] Similarly, the FCC required in its analysis of unbundled local switching whether "*actually* deployed switches in the market at issue permit competitive entry in the absence of unbundled local switching."[63] The FCC should again reject ACS' attempt—and that of any other ILEC—to use speculative facilities deployment as a basis upon which access to UNEs is eliminated. Moreover, if the FCC

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[60] ACS Comments at 10 and 11.

[61] *Triennial Review Order* at ¶ 446 (the FCC also stated that it was "unaware of any evidence that [cable telephony] technology can be used as a means of accessing the incumbent's wireline voice-grade local loops."); *see also* GCI RCA Reply Comments at 19-20.

[62] *See In the Matter of the New Requirements of 47 CFR § 251 Related to FCC Triennial Review Order on Interconnection Provisions and Policies,* R-03-7, Order No. 3, RCA Order Requesting Data, at 6 (attached hereto as Exhibit 3).

[63] 47 § C.F.R. 51.319(d)(2)

adopted as correct ACS' argument that the potential deployment of cable telephony eliminates any need for unbundled ILEC facilities, this would mean that all UNEs—including DS-0 loops—would automatically be denied in every market with a cable provider.

As stated, cable plant is almost entirely limited to residential customers. Access to business customers through alternative means is also not readily available. Even when GCI's network passes a retail customer, such as the large businesses in one of 22 office buildings in Anchorage served by GCI's fiber ring, it is very difficult to obtain access to other buildings that GCI's ring passes. Several carriers, including GCI and WorldCom, have previously documented the significant difficulties a competitive carrier faces when trying to negotiate access to multi-tenant buildings, such as the cost and delay associated with trying to negotiate access to conduit, either with a reluctant landlord or the ILEC.[64] Often, building access erects such a substantial barrier that GCI is forced to lease facilities from ACS—bypassing the facilities GCI has already installed—because this is the only means to reach the customer. In fact, building access and the related issue of access to rights-of-way have been identified as inherent "first mover" advantages that necessitate CLEC access to UNEs.[65] A retail market share test accompanied by the unsubstantiated assumption of alternative facilities, such as ACS proposes, would never acknowledge these real world sources of impairment that are captured by Section 251(d)(2)(B)'s express language.

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[64] "Building Access Issues Presented in the UNE Triennial Review," attachment to Letter of Ruth Milkman, Lawler, Metzger & Milkman, LLC to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, 98-147 (filed October 25, 2002) and GCI *Ex Parte* Letter, CC Docket No. 01-318 (filed Nov. 12, 2002).

[65] Letter from Robert H. Bork to Michael J. Powell, Chairman, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, 98-147 at 6 (filed January 10, 2003) (discussing three basic categories of impairment – economies of scale and scope, sunk costs, and other entry barriers, such as first mover advantage – that the Commission could consider as it interprets Section 251(d)(2)'s impairment standard in the wake of the D.C. Circuit Court of Appeals decision in USTA v. FCC, 290 F.3d 415).

The practical result of ACS' amorphous "standard" would be not only to automatically eliminate a potential local market competitor, but also to penalize that entity for the potential ability to deploy its own facilities, perhaps even before such deployment has occurred and the carrier is able to begin utilizing its investment. This unquestionably is in complete contravention of the Act and the goals of this Commission to help promote facilities-based competition. Thus, for all of these reasons, ACS' attempt to use future cable telephony deployments as a basis upon which to end access to all UNEs in Anchorage is not sound and should be dismissed.

III. THE COMMISSION SHOULD NOT ISSUE ANCHORAGE-SPECIFIC UNBUNDLING DETERMINATIONS BASED ON ACS' REINVENTION OF THE *TRIENNIAL REVIEW ORDER, USTA II* AND THE STATE *TRO* RECORD

As mentioned above, ACS ignores the holding of *USTA II* and asks the FCC to roll back the clock, and start all over again with respect to *all* of the findings from the original *Triennial Review Order* relevant to *all* UNEs.[66] Such action would render meaningless, most, if not all, of the FCC's *Triennial Review Order*. This is not what happened in *USTA II* nor is this the correct starting point for the Commission now. The remand before the FCC through this proceeding is not that broad. To be clear, the court in *USTA II* summarized it own actions as follows.

> We vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of this Order applies to the sudelegation scheme established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber). We also vacate and remand the Commission's nationwide impairment determinations with respect to these elements.[67]

[66] ACS Comments at 3 (ACS asks the Commission to start over relative to the obligation of the ILECs to provide unbundled access to UNEs and "presume no impairment". This is far more than the *USTA II* court requires and is simply an attempt to circumvent its unbundling obligations as an ILEC.)

[67] *USTA II*, 359 F.3d at 394.

ACS' attempt to broaden the FCC's undertaking in this NPRM—and scrutinize the availability of all UNEs[68]—is an abuse of the Commission's processes for the sole purpose of rolling back competition in Anchorage.[69]

A. Continued Access to Mass Market Switching and Shared Transport is Necessary Where the ILEC Blocks Access to Unbundled Loops

ACS claims that the Commission "should no longer require ACS to unbundle [*sic*] switching or shared transport.[70] ACS' entire focus of this argument is on the impairment analysis as applied to unbundled switching as a stand-alone UNE. GCI plainly has not sought unbundled switching in Anchorage as a stand-alone element. Having installed its own switch and invested in collocations in the five ACS central offices and two switch remotes, GCI has every incentive to utilize these deployed facilities to serve as many customers as possible. However, there are plainly circumstances where unbundled switching—in combination with unbundled transport and loops—is necessary to address an ILEC's ability to block access *to the customer loop*, and thus impede not only access to that element, but also the CLEC's use of the switching investment already made.[71]

While DLC deployment in Anchorage is widespread, many of the devices have universal DLCs or multi-hostable devices, providing access to the loop as required by the Commission.[72] Equipped in this manner, these devices do not block access to the loop, an ILEC bottleneck facility that remains a critical network element. However, today in Anchorage GCI cannot reach

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[68] *See e.g.* ACS Comments at 6 and 8 (where ACS basically argues that this Commission should determine it is not obligation to provide unbundled access for any UNE).

[69] *See* NPRM at ¶ 9 (stating that the FCC seeks comment as to how to respond to the issues from *USTA II).*

[70] ACS Comments at 8.

[71] Interestingly, in prior filing in this docket, ACS conceded that UNE-P should be an option available to GCI in cases where ACS had not deployed GR-303-capable IDLCs. January 6, 2003 ACS Ex Parte Letter at 7.

[72] *Triennial Review Order* ¶ 297.

nine percent of the loops—comprising all of the loops in the areas served by such devices that do not support multi-hosting—and the right incentives must be in place to ensure that more widespread deployment does not further disrupt the market. For this reason, GCI has demonstrated that these combination of elements must remain available not as individual UNEs, but as a remedy where access to the indisputably most fundamental UNE—the loop—is denied.[73]

ACS claims that GCI could simply remedy the fact that it does not have direct access to some customer loops with a very small investment through GCI self-deployment to the sub-loop.[74] Beyond the fact that such action would allow ACS to avoid its legal obligation to make the loops available to GCI in the central office, ACS significantly overstates its proposed "remedy". As GCI responded in the state case, costs for collocation vary greatly from site-to-site depending on various factors, including the types of devices ACS has installed with which interconnection is to be achieved, availability of space and power at the collocation site, whether the collocation will be physical or adjacent, and the number of lines for which the space and equipment must be designed.[75] Additionally, in GCI's experience, there are many potential barriers to collocation that may limit the ability to collocate at a particular site. For instance, collocation and cross-connection may not be achievable where there is insufficient space at the site for physical or adjacent collocation.[76] There may also be insufficient capacity at the main distribution frame to terminate tie cables, or lack of space for cross connection in housing for

[73] *See generally* GCI Comments at 6-20. *See* Letter from Tina M. Pidgeon, Vice President, Federal Regulatory Affairs, GCI, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-338 (filed July 1, 2004); *see also* NPRM at n. 38. *See also* Comments of Joint Commenters at 94.

[74] ACS Comments at 16-17.

[75] GCI RCA Comments – Brown Reply Testimony at 3.

[76] *Id.* at 4-5.

remotes or concentrators.[77] As such, the ability to collocate at a particular site will depend on the characteristics of that site and ACS' proposal is not a workable alternative to cure impairment.

B. ACS Challenge to Mass Market Loops is Outside the Bounds of the Proceeding, Unreasonable, and Unsupported on the Record

ACS objects to its continued provision of mass market loops, stating that Anchorage "market conditions demonstrate that there is no impairment in the absence of mass market loops".[78] First, as pointed out above, the national finding of impairment for DS-0 loops was not on appeal before the *USTA II* Court, and as such, is not even a proper issue before the FCC on remand in this proceeding. Indeed, in the *Triennial Review Order* itself, the FCC found that the record indicates that deployment of alternative local loop facilities for the purposes of providing telecommunications services to the mass market has been minimal."[79] Moreover, the FCC stated that the record shows that incumbent LECs continue to control the vast majority of voice-grade local loops throughout the nation".[80]

ACS erroneously claims that the "DC Circuit made it amply clear, the Commission may not preserve impairment on a national basis".[81] ACS provides no legal citation for this statement because it cannot. While the Court reviewed the FCC's authority to delegate impairment findings to the state, it did not issue a blanket prohibition on making national findings of impairment where such a finding could be supported. And for mass market loops—the single UNE for which the impairment finding elicited no challenge from any quarter (including ACS)—that finding clearly is supported everywhere.

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[77] *Id.*
[78] ACS Comments at 13.
[79] *Triennial Review Order* at ¶ 222.
[80] *Id.* at ¶ 224.
[81] ACS Comments at 14.

The facts are plainly not in ACS' favor. First, ACS raised no challenge to the presumption of non-impairment as to mass market loops—or DS-1 loops—in the Alaska state proceeding.[82] In fact, no ILEC in the country raised such a challenge on appeal or on remand.

At this juncture, ACS apparently had no alternative but to argue for a new standard, offering a specific impairment test for mass market loops apparently designed to yield ACS' preferred outcome in Anchorage. Specifically, ACS would have the FCC "presume no impairment in the ILEC's local exchange serving area where a CLEC: (1) has 30 percent or more of the local exchange market served by the ILEC; (2) can reach 60 percent or more of the customers in the market using its own loop facilities; and (3) is actually providing local exchange services over some portion of its own facilities."[83] This test is not designed to implement the statutory standard for impairment, rather it is intended to stop even UNE-loop competition before deployment of loop substitutes can progress. Rather than rely on factual evidence to suggest that GCI no longer needs access to unbundled DS0 loops, which it cannot, ACS relies on broad, conclusory claims about widespread access to UNE-loops that are unsustainable in *any* market, including Anchorage.

ACS claims that "[t]here is a point at which a CLEC has sufficient market share such that the CLEC is no longer afforded mandatory access to unbundled loops for mass market

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[82] As GCI addressed in the state proceeding, the RCA determined that access to the following unbundled elements were to be reviewed by the RCA, according to the FCC's impairment standards: DS0 local circuit switching, shared transport (to the extent relevant to the DS0 local circuit switching analysis), the batch cut process applicable to DS0 local circuit switching, and DS3 and dark fiber loops. GCI Comments at 5 (citing *In the Matter of the New Requirements of 47 CFR § 251 Related to FCC Triennial Review Order on Interconnection Provisions and Policies,* R-03-7, Order No.1 (Nov. 28, 2003) (attached to GCI Comments at Exhibit 2) at 9). No party in that proceeding disputed the FCC's findings regarding DS0 loops (mass market loops), DS1 loops or dedicated transport.

[83] ACS Comments at 14.

customers."[84] As discussed previously, retail market share cannot be used to assess whether impairment exists with respect to a specific UNE. Retail market share provides no indication as to whether or not sufficient alternatives are available so that the CLEC can still serve the customer if access to the UNE-loop is denied. In the absence of UNE-loops, GCI loses access to more than two-thirds of its current customers, and suddenly has less than the 30 percent retail market share that ACS claims to be relevant.

This is exactly the type of circular tail chasing that the Commission rightly rejected in the *Triennial Review Order*.[85] The facts—which ACS avoids—say it all: under ACS' foolhardy retail market share test, a vibrant competitive market where GCI has gained significant market share would be all but eradicated. At the moment the standard is applied, the very element that made retail competition possible would be eliminated, causing the retail market share to plummet. A nonsensical standard such as this did not pass muster before, and ACS can do nothing to repair its patent infirmities.[86]

Second, GCI does not even meet ACS' next criterion, that a given CLEC "can reach 60 percent or more of the customers in the market using its own loop facilities." ACS erroneously concludes that GCI can reach 100 percent of Anchorage customers using its own loop facilities including cable plant.[87] This is simply false. Nor can GCI reach 60 percent of the customer base on its own loop facilities. ACS continues to conflate the presence of cable plant with the ability

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[84] *Id.* at 13.

[85] *Triennial Review Order* at ¶ 115.

[86] In case the point of this standard—to get rid of GCI's retail customer base—were missed, ACS sharpens the point by demanding essentially no transition with the elimination of any UNE, including UNE loop. ACS Comments at 19-21.

[87] *Id.* at 14.

to actually provide a telephony serve to customers over that plant.[88] It suits ACS' purposes to interrupt GCI's UNE-L competition by vastly overstating the current status and pace of GCI's cable telephony product, which involves significant investment and plant upgrades that, buy any reasonable estimation, will take a number of years to complete.

ACS claims that because the FCC stated "cable infrastructure serves as a replacement for loops", the market conditions in Anchorage demonstrate there is no impairment in the absence of loops.[89] ACS takes the FCC's statements completely out of context. In noting the required "retrofitting" of cable infrastructure and substantial investment toward such modifications necessary to make cable plant hospitable for voice communications, the FCC states that "it is difficult to predict at what point cable telephony will be deployed on a more widespread and ubiquitous basis".[90] The mere presence of a cable provider is not a sufficient basis upon which to find non-impairment as to mass-market loops. Moreover, most businesses in Anchorage are not passed by cable plant and, as such, GCI's cable telephony product is not even a possible option to reach the enterprise market.

In the meantime, ACS seeks leave to deny access to the UNE-loops themselves without redress, proposing that switching and transport be eliminated in every form. As GCI has demonstrated, however, not only is continued access to UNE-loops necessary, but also access to the loops in combination with unbundled switching and transport is necessary where the ILEC has blocked access to unbundled loops due to IDLC-served loop installations. As ACS continues to deploy these devices, the need for ILEC-provided loop alternatives becomes more pressing to

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[88] ACS' use of the word "reach" is an apparent concession to the fact that the vast majority of GCI's cable plant cannot even be used to provide local service. Under this bizarre reading of a competitive alternative, it could also be said that power lines "reach" more than 60 percent of the customers in the market.

[89] ACS Comments at 13.

[90] *Triennial Review Order* at ¶ 229.

address incentives for ILECs to drive up CLEC costs by forcing sub-loop access, obstructing CLEC use of deployed switching and transport facilities, and denying the CLEC access revenues and USF by pushing them from UNE-L to resale. This is precisely what has occurred in Fairbanks (over 29 percent of the loops) and Juneau (over 50 percent of the loops), and though the impact has been to a lesser degree in Anchorage, the ability to gain access to blocked loops via UNE-P is necessary to curb ILEC incentives to disrupt CLEC operations through network deployments.[91]

Finally, with respect to ACS' third criterion, the fact that a competitor is providing local exchange services over "some portion" of its own facilities is not indicative as to whether it is impaired without access to mass market loops and is far too vague as to provide any sort of meaningful measure of non-impairment. A standard of "some portion" is meaningless and could mean a switch or a piece of fiber. This is not a meaningful measure of impairment.

For all of these reasons, ACS' bid to eliminate a single competitor in a single market should be rejected. Mass-market loops are not before the Commission. As to the substance of the ACS "test," it is not indicative of whether a CLEC is impaired without access to mass market loops, and would be used only to shut down competition before alternative facilities deployment matures.

C. High Capacity Loops --DS1 Loops, DS3 Loops and Dark Fiber

With respect to DS1s, and similar to the case of mass market loops, ACS' belated challenge to DS1 loops is inappropriate here for many reasons. First, the FCC's impairment finding as to DS1s loops remains valid, and is not appropriately reconsidered in this

[91] GCI notes again that this issue does not just affect the CLEC's provision of voice-grade service, but also reaches its ability to provide DSL service to customers over bare copper loops. *See* GCI Comments at 26-27. For this reason, an adequate transition and nondiscriminatory access to spare copper loops is critical when a CLEC's ability to provide DSL over spare copper loops is disrupted by ILEC network changes.

proceeding.[92] Second, and consistent with the continuing evidence of impairment with respect to DS-1 loops, "ACS did not challenge the Commission's impairment finding as to DS1 loops" in the state *TRO* proceeding, as ACS admits.[93]

As the Loop and Transport Coalition demonstrate, there is ample evidence before the Commission—including numerous independent industry studies and filings as well as prior Commission analyses—upon which the FCC may reiterate its national finding of impairment as to DS1s, as well as other high capacity loops.[94] As several commenters point out, the FCC found in the *Triennial Review Order* that "requesting carriers generally are impaired without access to unbundled DS1 loops."[95] Indeed, the FCC found the record before it so compelling, that it did not refer consideration of the self-provisioning trigger to the states, but instead made a final, nationwide determination of impairment on these grounds.[96]

Similarly, GCI demonstrated in its Comments, from its experience in Alaska, for those customers where a DS1 loop is required, GCI has no alternative but for ACS.[97] In the state case and the instant proceeding, ACS is simply unable to contradict the fact that no other alternatives – either actual or potential – exist for DS1s.

Nevertheless, ACS makes a series of unpersuasive claims regarding GCI's loop facilities which simply do not justify a showing of non-impairment and is not credible. Not only does

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[92] *See* Loop and Transport Coalition Comments at 88 (DS1 loops were not subject to vacatur by the *USTA II* decision).

[93] ACS Comments at 12, n. 35.

[94] Loop and Transport Coalition Comments at 92-105 (In addition to the substantial record amassed during the *Triennial Review* case, the evidence available to the FCC includes an independent evaluation by QSI consulting group analyzing records from a number of state impairment proceedings which show impairment without access to high capacity loops, and other analyses by the FCC in recent orders such as the CLEC access charge order which shows that control of the local loop and access to the end user customer confers monopoly power to that controlling carrier. *Id.* at 96).

[95] *Id.* at 90 (citing the *Triennial Review Order* at ¶ 325).

[96] *Id.* (citing *Triennial Review Order* at ¶ 327).

[97] GCI Comments at 29.

ACS not bother to identify the capacity level of the loop to which it is referring in any of its statements, but for every one of its assertions about GCI's facilities, ACS cites to its own witness testimony.[98] As such, this vague, unquantifiable evidence cannot be relied upon to show non-impairment.

Specifically, ACS states that GCI owns the loop lines that serve 25% of its retail lines throughout Alaska.[99] As an initial matter, ACS argument lacks credibility as it tries to use an Alaska-wide figure to demonstrate GCI is not impaired in Anchorage. More critically, however, this figure is inaccurate. Even including ISP lines, GCI only provisions approximately seven percent of its customer lines entirely over its own facilities.[100] Additionally, as GCI previously stated, the FCC has already rejected this proferred correlation between retail market share and the impairment analysis.[101] For all of these reasons, ACS' retail market share argument must fail.

Second, ACS argues that GCI is not impaired because GCI has constructed a fiber ring that serves 22 buildings in Anchorage and places GCI in a position to extend high-capacity to additional buildings.[102] ACS fails to point out however, that just because a fiber route passes a building does not mean it can automatically be used to provide service to that building. In addition to the building access and right-of-way issues described earlier, other steps are required including placing fiber from the nearest splice point into the building, usually through the establishment of underground facilities. This process is resource and time intensive including digging up parking lots and streets to place an entrance conduit, running conduit inside the

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[98] *See e.g.* ACS Comments at 12.
[99] *Id*. at 12.
[100] GCI RCA Reply Comments at 39.
[101] *Id*. at 17; see also *Triennial Review Order* at ¶¶ 114-115.
[102] ACS Comments at 12.

building, as well as, installing power and battery plants, optical multiplexing equipment and associated hardware. In addition, there may be other service requirements for the tenants of a building that also add to whether or not placement of fiber facilities in that location is economically viable. In this way, ACS argument about GCI's fiber ring is speculative and cannot be used to show non-impairment.

Third, ACS repeatedly points to GCI's installation of loop facilities in two subdivisions in Anchorage as persuasive evidence that access to loops of any capacity are not needed.[103] Even had ACS gotten its facts right on this matter, its claim still would not support elimination of loops as UNEs. GCI has built its own telephony facilities to two neighborhoods on the Elmendorf Air Force Base (EAFB) in Anchorage. Incredibly ACS claims it "needs access to GCI's facilities where GCI is the facilities-based carrier"[104] at these locations. But contrary to these claims, and although GCI has no legal obligation to do so, GCI has offered ACS UNEs (including multi-hosting) at these two subdivisions on the same rates, terms and conditions that ACS provides them to GCI.[105] To date, ACS has not accepted this service arrangement. Instead, at both of these subdivisions, ACS has elected to serve its customers on a resale/wholesale basis using GCI facilities. As such, ACS cannot show a nexus between GCI's presence at the EAFB and whether GCI is impaired without access to high capacity loops in Anchorage.

GCI notes that it serves approximately 470 lines total at these locations – less than one-half of one percent of the total Anchorage market. It is beyond rationality that the deployment of facilities to serve these customers indicates an immediate and instantaneous ability to serve the balance of customer loops throughout Anchorage. Nor does GCI's limited deployment at the Air

[103] ACS Comments at 12; *see also* ACS Comments at 13, 16, and 18.
[104] *Id.* at 12-13.
[105] GCI RCA Reply Comments – Brown Reply Testimony at 6-7.

Force create "equal bargaining power" between ACS and GCI as ACS claims.[106] Indeed, if that were the case, then ACS would be approaching GCI now for access to each other's facilities at mutually acceptable terms. The fact that ACS' approach is instead to seek the regulator's complicity in shutting down competition *before* loop deployments can proceed reveals ACS' gambit for what it is—an effort to kill competitive entry, and soon.

As part of its analysis, GCI presented evidence in the state case that demonstrated impairment to access without high capacity loops pursuant to the FCC's triggers analysis. As several commenters noted, this analysis still remains valid. "*USTA II* did not vacate the Commission's nationwide finding of impairment based on the self-provisioning trigger, nor its finding that the record lacked adequate evidence for it to make a finding of non-impairment based on the wholesale trigger, and those conclusions by the Commission remain in effect".[107]

As such, in the state case (in which ACS only challenged DS3 loops and dark fiber), GCI showed that the trigger for DS3 loops is met if two or more providers, unaffiliated with each other or the incumbent, self-provision loops or offer competitive wholesale facilities.[108] GCI was the only discovery respondent to report any high-capacity loop services.[109] Without more, ACS fails to show these triggers are met.

Nor is it sufficient to issue a non-impairment finding under a potential deployment analysis simply by pointing to GCI.[110] For even where the FCC stated that self-provisioning should be given weight, this was specifically in the context of being able to make a

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[106] ACS Comments at 12-13.

[107] Loop and Transport Coalition Comments at 90.

[108] *See generally* GCI Comments at 30-31; GCI RCA Reply Comments at 37.

[109] *See* GCI Comments at 30, n. 96. *See also* GCI RCA Comments at 37 and GCI Thatcher Reply Testimony at 21

[110] GCI RCA Reply Comments at 38.

determination that the market can support multiple, competitive supply.[111] ACS has made no such claim and, in fact, in its Comments, has said exactly the opposite stating that multiple facilities based competition in Anchorage is "likely to never occur".[112] As a result, ACS states that any impairment standard that includes the existence of multiple facilities-based competitive supply in its analysis could lead to "absurd" results in Anchorage.[113] But as GCI witness Kelley noted, the FCC intentionally chose three competitors in its multiple competitive supplier analysis in order to show that entry barriers in a particular market are not "insurmountable".[114] Other CLEC entrants may not have the same experience or investments as GCI.[115] As such, ACS cannot demonstrate the potential for multiple, competitive supply of high capacity UNE loops and, thus, fails to show non-impairment as to these elements.

In sum, ACS simply can do nothing to rebut the evidence that GCI is impaired without access to high-capacity loops presenting instead vague, unsupported claims that are not credible. Indeed, ACS' witness Shelanski admitted ACS has no evidence to demonstrate non-impairment stating that, there is no data available in the state case to "permit me to reach any concrete conclusions about impairment due to high-capacity loops".[116] As such, given the weight of the record, and consistent with the evidence in the Alaska state case, the FCC should affirm its impairment findings relevant to high-capacity loops.

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[111] *Id.*

[112] ACS Comments at 6.

[113] *Id*. at 5 and 6 (stating that the entry of multiple facilities-based providers is "likely to never occur" in Anchorage).

[114] GCI RCA Reply Comments - Kelley Reply Testimony at ¶¶ 42, 47 (citing *Triennial Review Order* ¶ 501).

[115] GCI RCA Reply Comments - Kelley Reply Testimony at ¶ 42. *See also* GCI RCA Reply Comments at 37. For these same reasons, ACS' argument regarding GCI's statements in discovery -- that its facilities may be used in place of DS 3 or dark fiber loops for specific customer locations -- lacks merit. ACS Comments at 12. As discussed, a single self-supplier is not enough to show impairment.

[116] GCI RCA Reply Comments at 37 (citing ACS Shelanski Affidavit at ¶ 35).

D. Dedicated Transport

ACS claims that it has sufficiently demonstrated that GCI is not impaired without access to dedicated transport elements. This claim is clearly contrary to the data presented by GCI in this docket and to the RCA where the weight of the evidence shows impairment using the relevant analysis.

While GCI does have fiber facilities between ACS central office locations and makes high-capacity fiber available under tariff,[117] the record in the Alaska case reflects that GCI is the only carrier unaffiliated with the incumbent to do so.[118] ACS failed to identify any other provider that offers transport facilities between ACS wire centers or switches,[119] and discovery during the proceeding to other carriers identified no additional providers. Thus, the self-deployment and competitive wholesale triggers were not met on any route and ACS is unable to show non-impairment.

ACS erroneously tries to make an argument regarding GCI's fiber capacity -- including its submarine cable landing facilities -- for use as dedicated transport.[120] But as GCI pointed out in its state case, this claim fails. These fiber facilities are not transport facilities as defined for the purpose of unbundled network elements because they are not between two ACS switching centers, terminating in a collocation arrangement in the central office. Under paragraph 406 of

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[117] *See* GCI Comments, Exhibit 6 (Response of GCI to RCA Order Requesting Data, R-03-7 (Mar. 19, 2004) at 7 (Response to Question No. 22).

[118] *See* GCI Comments at 28.

[119] Although ACS referred to another fiber provider in its state testimony, and makes that same reference in these comments, (ACS Comments at 11) AFS fiber, nothing in the state record indicated a single ACS route where both GCI and AFS are thought to provide transport. Moreover, ACS' general claims of fiber deployment do not demonstrate the potential for "competitive, multiple supply" of transport along any given route. Indeed, most of the facilities it mentioned are not transport facilities as defined for the purpose of unbundled network elements because they are not between two ACS switching centers, terminating in a collocation arrangement in the central office. (*See Triennial Review Order* at ¶ 406). *See also* GCI Comments at 28, n. 89.

[120] ACS Comments at 11.

the *Triennial Review Order*, the fiber in a terminating collocation arrangement in an incumbent's central office is to be counted as a competitive facility. As such, a review of alternatives to incumbent –provided transport has to be targeted to fiber that physically connects ACS switching facilities. ACS cannot credibly make a showing of non-impairment for dedicated transport in Anchorage and rebut the evidence presented by GCI in the state case and this docket.

IV. THE COMMISSION SHOULD REJECT ACS' REQUEST FOR ITS OWN TRANSITION PERIOD

To the extent that the Commission determines that any current UNEs are no longer required for unbundling, an appropriate transition is necessary to ensure unnecessary disruption to consumers and to existing competitors. Indeed, ACS' demand that no transition should apply for Anchorage[121] underscores that the only purpose for denying any transition—and, indeed, for its exclusive approach to the designation of UNEs—is to impose the greatest disruption to consumers who have had the audacity to subscribe to the competitor and to ensure that those customers are forced back to the incumbent without the incumbent actually having to change its own "quiet life" to respond to consumer demands.

ACS suggests that once the FCC terminates all obligations of ACS to provide any UNEs to GCI in Anchorage—as ACS advocates—GCI will have to move off of ACS facilities the earlier of: (1) the date of Federal Register Publication; or (2) three months from the release of its order.[122] As an initial matter, ACS provides no reason for the FCC to adopt one truncated transition plan to be applicable only to ACS for the Anchorage market and then another transition plan for everywhere else. ACS points to its "unnecessary, costly competitive

[121] ACS Comments at 19-20.
[122] *Id*. at 20.

burden"[123] and that providing UNEs at TELRIC prices "works a hardship on ACS",[124] without any specified evidence or support whatsoever.[125] ACS also points to a sudden concern for "stifl[ing] competitive deployment of facilities",[126] which runs directly counter to its claims that unbundling of any element is unnecessary because of GCI's widespread facilities deployment. ACS is apparently willing to take any side of the issue to further its desired result—disruption of competition.

On the substance of the its transition plan, the ACS proposal lacks merit. Not only is ACS unable to cite any legal support for its truncated plan, the ACS transition proposal is contrary to the *Triennial Review Order* and all of the critical public policy reasons that form the basis for that plan. As the Joint Commenters explained in their initial pleading, appropriate transitional rules "enable carriers and customers to adjust to changing conditions".[127] GCI echoes the statements of the Joint Commenters that "[t]he transition plan that the Commission adopted in the *Triennial Review Order* – which neither was challenged by the ILECs nor criticized by *USTA II* – provides the appropriate foundation" upon which any transition should be based.[128]

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[123] *Id.* at 15.

[124] *Id.* at 20.

[125] This is more of the same ACS complaints about TELRIC that it made in this docket over two years ago. Specifically, ACS claimed then that TELRIC pricing has a "deterrent effect" on CLEC investment in facilities. ACS Reply Comments, CC Docket Nos. 01-338, 96-98, and 98-147, at 7 (May 31, 2002). This claim stands in stark contrast to ACS repeated claims about GCI's substantial facilities deployment. But making ACS' claims about pricing even more disingenuous is the fact that the Regulatory Commission of Alaska recently ordered an almost 25 percent increase in UNE loop rates for Anchorage going from $14.92 per loop to $18.64, such that leasing UNEs during the transition period could hardly be viewed a "hardship" to ACS. GCI is in the process of disputing the increased final rates.

[126] ACS Comments at 20.

[127] Comments of Joint Commenters at 82.

[128] *Id. See also* Comments of Joint Commenters at 93 (highlighting specific components of a transition plan if the Commission reaches a finding of non-impairment as to unbundled mass market switching).

Importantly, the Joint Commenters noted that, in adopting a transition plan, in the *Triennial Review Order* the FCC recognized the importance of avoiding "significant disruption to the existing customer base" if the Commission makes a finding of non-impairment and certain UNEs are no longer available.[129] This critical policy consideration is still true today. The ACS three-month transitional mechanism is not reasonable for any CLEC to either find alternative facilities or build new facilities should the Commission find GCI is not impaired without access to certain elements, all while ensuring a lack of disruption to GCI customers.[130]

Additionally, GCI points out that if there were "equal bargaining power", as ACS claims throughout its comments, based on incremental loop deployment, ACS would be offering a solution now, not seeking to disrupt GCI's service with a bogus request to cut off UNE access immediately. But ACS has made no such offer, because it continues to control the bottleneck loop facility required by GCI to serve the vast majority of its customers. Instead, ACS is using this proceeding to get regulatory relief specific to its operations in Anchorage to avoid having to compete. For all of these reasons, there simply is no justification for the truncated transition plan as ACS advocates.

[129] *See* Comments of Joint Commenters at 92 (citing *Triennial Review Order* at ¶ 529).

[130] Additionally, GCI notes that ACS advocates anyway it can to circumvent a reasonable transition process at the same time that it has offered no evidence to show support for a workable batch cut process for swinging loops to GCI's switch. GCI proposed several requirements necessary to a successful batch cut process in the initial round of comments to the NPRM. *See* GCI Comments at 31.

VI. CONCLUSION

Based on the foregoing and GCI's initial comments, GCI respectfully requests that the Commission specify where an ILEC cannot provide a CLEC access to a voice-grade loop in the ILEC central office, that among the alternative "technically feasible method[s] of unbundled access" is the provision of access to the loop in combination with local switching and related signaling and common transport. In addition, the Commission should reject the ACS-proposed "changes" to the impairment standard, designed only to reverse facilities-based competitive gains without making any *bona fide* market-specific impairment analysis Finally, GCI urges the FCC to reaffirm its national impairment findings as to DS1 loops, high capacity loops, and dedicated transport, as supported by the record in this proceeding, and to reject ACS' invitation to revisit the unassailable national impairment finding for mass market loops for the sole purpose of finding that GCI is the only CLEC in the country that is not impaired without access to mass market loops.

Respectfully submitted,

By: /s/

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Dated: October 19, 2004